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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 259

THE WIEMAN AND WARD COMPANY, Petitioner

v.

CITY OF PITTSBURGH and JAMES P. KIRK, Treasurer

and

THE WIEMAN AND WARD COMPANY, Petitioner

v.

THE SCHOOL DISTRICT OF PITTSBURGH and JAMES P. KIRK, Treasurer

PETITION OF THE WIEMAN AND WARD COMPANY FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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REFERENCE TO OPINIONS DELIVERED IN COURTS BELOW

The opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, was filed by Judge T. M. Marshall, sitting as trial judge, on February 18, 1952. The opinion of the Court en banc of the Court of Common Pleas of Allegheny County, Pennsylvania, was filed on June 2, 1953, and on reargument filed September 3, 1954.

The opinion by Horace Stern, Chief Justice, of the Supreme Court of Pennsylvania, rendering the judgment

sought to be reviewed was filed on May 4, 1955, and is officially reported at 381 Pa. 535 (1955).

All of the above opinions are set forth in Appendix A to this Petition.

STATEMENT OF GROUNDS OF JURISDICTION

The judgment sought to be reviewed by this Petition was filed on May 4, 1955.

The statutory provision conferring jurisdiction on this Court to review the judgment of the Supreme Court of Pennsylvania by Writ of Certiorari is found in 62 Stat. 929, 28 U.S.C. § 1257 (3) (1948). It is submitted that the City of Pittsburgh Ordinance No. 488 of 1947 and the Act of the General Assembly of Pennsylvania, Act of June 20, 1947, P. L. 745, (Pa. Stat. Ann. tit. 24 §582.1 et seq.), both of which imposed Mercantile License Taxes based on the gross receipts from the sales of the Petitioner, The Wieman and Ward Company, as construed and applied to transactions of the Petitioner, are repugnant to the Commerce Clause of the United States Constitution, U. S. Const. Art. I, § 8, cl. 3, because they tax the gross receipts of transactions in interstate commerce.

QUESTIONS PRESENTED FOR REVIEW

Are transactions in Interstate Commerce subject to local mercantile taxes measured by gross receipts where a Pittsburgh dealer sells coal to:

(a) Pennsylvania companies who specify out of state coal for delivery directly to third parties in another state, the coal never entering Pennsylvania?

(b) Pennsylvania dealers who specify Pennsylvania coal for delivery directly across state lines to out of state purchasers?

(c) Out of state purchasers who, in out of state negotiations, specify out of state coal for delivery directly to Pennsylvania scales?

(d) Pennsylvania companies who specify out of state coal for delivery directly to purchasers or customers in Pennsylvania?

(e) Foreign corporations which, in out of state negotiations, specify out of state coal towed by river barges to Pennsylvania loading stations, where more coal is added, and then towed in the same barges to destinations out of state?

(f) Foreign corporations which, in out of state negotiations, specify Pennsylvania coal trucked to Pennsylvania loading stations, loaded directly on barges and shipped to destinations out of state?

CONSTITUTIONAL PROVISION, STATE STATUTE, AND CITY ORDINANCE WHICH THE CASE INVOLVES

This case involves:

(1) The Commerce Clause of the United States Constitution, U. S. Const., Art. I, § 8, cl. 3—"Congress shall have Power to Regulate Commerce with Foreign Nations and among the Several States and with the Indian Tribes."

(2) Pennsylvania Statute: Act of June 20, 1947, P. L. 745 (Pa. Stat. Ann. tit. 24 § 582.1 et seq.). For pertinent sections see Appendix A.

(3) City of Pittsburgh Ordinance No. 488 of 1947 enacted pursuant to Pennsylvania Act of June 25, 1947, P. L. 1145 (Pa. Stat. Ann. tit. 53 § 2015.1) For pertinent sections see Appendix A.

STATEMENT OF THE CASE

The City of Pittsburgh, by virtue of Act No. 481 of the General Assembly of Pennsylvania, Act of June 25, 1947, P.L. 1145 (Pa. Stat. Ann. tit. 53 §2015.1 et seq.) enacted Ordinance No. 488 of 1947 imposing a mercantile license tax at the rate of one mill on each dollar of the volume of annual gross business transacted during the preceding year by wholesole vendors of or dealers in goods, wares, or merchandise.

The School District of the City of Pittsburgh, by virtue of Act No. 320 of the General Assembly of Pennsylvania, Act of June 20, 1947, P. L. 745 (Pa. Stat. Ann. tit. 24 §582.1 et. seq.), imposes an annual mercantile

license tax upon wholesale vendors of or dealers in goods, wares, or merchandise at the rate of one-half mill on each dollar of the volume of annual gross business.

Petitioner, The Wieman and Ward Company, a Pennsylvania corporation with its principal place of business in Pittsburgh, is engaged in the business of wholesale vendor of and dealer in coal and coke. The sources of Petitioner's coal and coke are mines and ovens in the States of West Virginia, Kentucky, and Pennsylvania. Consumers of coal purchased and sold by Petitioner are located in almost every state of the United States east of the Mississippi.

The characteristics of coal, including sulphur content, moisture content, residual ash, volatility, expansion factor, fixed carbon content, friability, and heat productivity per pound computed in "British Thermal Units", differ with each seam of coal or with each mine. Thus coal from one seam will qualify for the particular use of the consumer, while coal from other seams will not so qualify.

For this reason, the buyer specifies the source of the coal by mine name, thus insuring himself that he will obtain coal having the unique characteristics which he desires for his particular use.

This case involves a dispute over the taxability of six different classes of transactions entered into by Petitioner in its business of dealing in coal and coke. Petitioner paid, under protest, the taxes imposed by the City of Pittsburgh and the School District of Pittsburgh on these transactions. The various transactions in-

volved here, the facts of which are not in dispute, are as follows:

CLASS A

Class A transactions consist of sales from out of state mines and ovens to Pennsylvania Companies for delivery directly to third parties out of state. The coal or coke never enters the state of Pennsylvania. The purchaser specifies the source of the coal or coke which he wishes to purchase.

CLASS B

Class B transactions consist of sales from Pennsylvania mines and ovens to dealers in Pennsylvania but delivered directly to third parties out of state. There is no delivery in Pennsylvania.

CLASS C

Class C transactions consist of sales from out of state mines to out of state purchasers (the Baltimore & Ohio Railroad in all instances) for delivery to scales in Pennsylvania. The purchaser specifies the source of the coal which he wishes to purchase, the negotiations for these sales were carried on out of state and the orders were placed from out of state.

CLASS D

Class D transactions consist of sales from out of state mines and ovens to Pennsylvania companies for delivery to them or their customers in Pennsylvania. The purchaser specifies the source of the coal or coke which he wishes to purchase.

CLASS E

Class E transactions consist of sales from out of state mines to Weirton Steel Company, Weirton, West

Virginia. The contract which was negotiated in Weirton, West Virginia, required Petitioner to load West Virginia coal into Weirton barges at loading points along the Monongahela River in West Virginia. The barges would be loaded as fully as water conditions on the river would permit and then delivered to Weirton's loading station at Isabella where, because of greater river depth, the barges would be completely loaded with Weirton coal by Weirton and then towed direct to the Weirton Steel Company at Weirton, West Virginia. The layover at Isabella, Pennsylvania, was no longer than necessary to complete the loading of the barges.

CLASS F

Class F transactions consist of sales from Pennsylvania mines to Weirton Steel Company, Weirton, West Virginia. The contracts which were negotiated in Weirton, West Virginia, required Petitioner to ship the coal from the mines by truck for loading into Weirton barges for immediate shipment to Weirton, West Virginia, for use there.

The question, involving the power of the City of Pittsburgh and the School District of Pittsburgh to tax these transactions because of the commerce clause of the United States Constitution, was raised in the Bill of Complaint of the Petitioner in the following averment:

(R. 14a, 265a) "11. Plaintiff is advised, believes and therefore avers that the transactions upon which the above mentioned additional taxes were assessed were not transactions of the nature and kind made taxable under said Act No. 481 of the General Assembly of Pennsylvania, approved June 25, 1947, and said Ordi-

nance No. 488 of the City of Pittsburgh, approved December 1, 1947; for the reason that said transactions were in interstate commerce or otherwise protected from taxation under said Act and Ordinance by provision of the Constitution of the United States and of the Constitution of the Commonwealth of Pennsylvania."

This averment of the Petitioner has been passed upon in each of the opinions of the courts below. Judge Marshall, in the original opinion of the Common Pleas Court of Allegheny County, Pennsylvania, found for the Petitioner and held that the mercantile taxes could not be assessed on the transactions in question. (App. A, p. 19). Upon review by the Court of Common Pleas of Allegheny County sitting en banc, the trial court's decision was sustained (App. A, pp. 29, 32). The Supreme Court of Pennsylvania on appeal from the decision of the Court en banc ruled that the transactions were taxable (App. A, p. 48).

From that decision, The Wieman and Ward Company petitions this Court to grant a Writ of Certiorari to the Supreme Court of Pennsylvania.

ARGUMENT

I. The decision of the Supreme Court of Pennsylvania is not in accord with the applicable decisions of this Court because it allows gross receipts taxes to be levied on the proceeds of transactions in interstate commerce where there are not sufficient local incidents on which to base the tax.

There are six different types of transactions involved in this case. They have been set forth in detail in the statement of the case and are summarized for the Court's convenience in Appendix B of this Petition.

Each of the transactions involves the movement of coal in interstate commerce. The questions presented to this Court are whether the decision of the Supreme Court of Pennsylvania upholding the gross receipts taxes of the City and School District of Pittsburgh levied on these transactions is in accord with the applicable decisions of this Court construing the commerce clause of the United States Constitution.

Under the applicable decisions of this Court, a local taxing authority cannot levy a gross receipts tax on the proceeds of a transaction in interstate commerce unless there are sufficient local incidents upon which to base the tax. It is the Petitioner's position that there are not sufficient local incidents in any of the transactions in this case upon which to base the local gross receipts taxes.

In the interest of brevity, only two of the six transactions will be discussed. The other four transactions while equally important are variations thereof. The two transactions discussed clearly illustrate that the gross

receipts taxes of the City and School District of Pittsburgh as applied to these transactions are unconstitutional.

(a) Where the coal involved in the sale never enters the State of Pennsylvania, no gross receipts tax can constitutionally be levied on the transaction.

In the transactions designated as Class A, the coal never enters the State of Pennsylvania, let alone the boundaries of the taxing authority.

The characteristics of coal differ with each seam of coal or with each mine. Thus coal from one seam will qualify for the particular use of the consumer, while coal from other seams will not so qualify.

For this reason, the buyer specifies the source of the coal by mine name so that he will obtain coal having the unique characteristics which he desires for his particular use.

At the buyers direction the coal is then delivered out of state to a customer of the buyer (See Appendix B).

The Pennsylvania Supreme Court held that the mercantile taxes of the City of Pittsburgh and the School District of Pittsburgh could be levied on these transactions. In its opinion it relied primarily on its prior decisions in *Keystone Metal Co. v. Pittsburgh,* 374 Pa. 323, 97 A2d 797 (cert. denied 346 U. S. 887, rehearing denied 917) (1953).

The United States Supreme Court decisions which were cited by the Pennsylvania Supreme Court were *Western Live Stock v. Bureau of Revenue,* 303 U. S. 250

(1938); *Southern Pacific Co. v. Gallagher*, 306 U. S. 167, 176 (1938); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 58, (1940); *International Harvester Co. v. Department of Treasury*, 322 U.S. 340 (1944); and *Norton Co. v. Department of Revenue of Illinois*, 340 U.S. 534 (1951). None of these decisions support the levy of a gross receipts tax on Class A transactions.

The *Western Live Stock* case, *supra*, involved the taxation by New Mexico of the gross receipts of the sale of advertising space by a publisher in New Mexico to advertisers outside the state. In that case this Court relied on the *American Manufacturing Co.*[1] case as authority for the tax on a local business carried on in the state.

The question presented in this case is clearly not controlled by the decisions in the *Western Live Stock* or the *American Manufacturing Co.* cases as Wieman and Ward does not carry on any manufacturing, publishing, or similar activities within the taxing jurisdiction. Wieman and Ward acts only as a wholesale vendor of coal and coke.

In all the other cases cited by the Pennsylvania Supreme Court as referred to above, there is a delivery of the subject matter of the transaction within the taxing jurisdiction, a local incident on which to base the tax. In this case the taxing jurisdiction is the City of Pittsburgh.

In *Southern Pacific Co. v. Gallagher, supra*, this Court held valid a use tax on goods purchased out of state

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1. American Manufacturing Co. v. City of St. Louis, 250 U.S. 459 (1919).

by a railroad doing business in California on the ground that there was an event where the goods came to rest in California, the taxing jurisdiction, after the sale.

McGoldrick v. Berwind-White Coal Mining Co., supra, involved a tax on sales of goods for consumption which was a use tax with a different name. This Court upheld the tax because the contract of sale was made in the taxing jurisdiction and there was a delivery of goods to the purchaser for consumption within the taxing jurisdiction.

The decisions of this Court in the *International Harvester* case, *supra,* and in the *Norton* case, *supra,* sustained gross receipts taxes where the goods were delivered to customers within the taxing jurisdiction.

It is apparent that the important factor in allowing the tax in the above decisions is the *delivery* of the goods within the taxing jurisdiction. This affords the taxing authority a sufficient local incident upon which to base the tax.

In Class A transactions there was no delivery of the coal in the taxing jurisdiction, Pittsburgh. In fact, the goods never entered Pennsylvania. Those cases cited by the Pennsylvania Supreme Court cannot control this case.

It is submitted that Class A transactions are controlled by *J. D. Adams Manufacturing Co. v. Storen,* 304 U.S. 307 (1938) and *Freeman v. Hewit,* 329 U.S. 249 (1946) in which cases there was no delivery of goods within the taxing jurisdiction. Although those cases hold that the interstate character of the sale (where the seller is in a different state from the buyer)

makes the tax a burden on interstate commerce, it is the fact that there was no delivery within the taxing jurisdiction which distinguishes the cases from the *Norton* case and the *International Harvester* case, *supra*. The gross receipts tax imposed on Class A transactions is a burden on interstate commerce and should not be sustained by this Court.

The Petitioner knows of no cases decided by this Court which have permitted a tax on the gross receipts of a sale of goods where the goods were transported across state borders and were never within the taxing jurisdiction.

(b) Where negotiations for the sale of coal take place outside the taxing jurisdiction and pursuant to contract the coal is shipped from West Virginia by river through the taxing jurisdiction back to West Virginia, the proceeds of the transaction cannot constitutionally be reached by a Pittsburgh gross receipts tax.

In the transactions designated as Class E (See Appendix B) negotiations are carried on outside Pennsylvania with an out of state purchaser. The coal is then obtained from a specified out of state mine and placed on the purchaser's barges on the Monongahela River in West Virginia and started on its journey via that river, through Pennsylvania, to a destination also in West Virginia.

Due to the shallow nature of the river in West Virginia where the Petitioner's coal is loaded, the barges cannot be loaded to capacity. Therefore, the barges are stopped at Isabella, Pennsylvania, and loaded with

more coal belonging to the out of state purchasers in order to utilize the barges' full capacity. The Petitioner's coal is not taken off the barges but continues to its ultimate destination in West Virginia on the same barges on which it started.

The Pennsylvania Supreme Court in holding valid the gross receipts tax as applied to Class E transactions relied on *Chassaniol v. City of Greenwood,* 291 U. S. 584 (1934); *Department of Treasury of Indiana v. Wood Preserving Corporation,* 313 U. S. 62 (1941); *International Harvester Co. v. Department of Treasury,* 322 U. S. 340, 345 (1944); and *Interstate Oil Pipe Line Co. v. Stone,* 337 U. S. 662 (1949).

None of these cases support the tax on Class E transactions.

In *Chassaniol v. City of Greenwood, supra,* a flat occupation tax was imposed on a cotton dealer who bought cotton within the State of Mississippi and later sold 90 per cent of it for shipment in interstate commerce. This Court held the tax valid because it was imposed upon local activities which occurred prior to interstate shipment. The tax imposed upon the activities of Wieman and Ward is a gross receipts tax measured by their volume of business and is entirely different from the flat rate license tax that was upheld in the *Chassaniol* case.

In the *Wood Preserving case, supra,* the Indiana gross receipts tax was upheld on transactions involving the sale of goods which were originally from Indiana, delivered to a purchaser there and later shipped out of state. In that case, the taxable incident was the

local delivery of the goods before they entered the flow of interstate commerce. In Class E transactions there is no taxable incident of local delivery, before the coal enters the flow of interstate commerce. Unlike the fact in the *Wood Preserving* case, the coal here is already in the flow of commerce when it temporarily stops at Isabella, Pennsylvania, a place which is outside the taxing jurisdiction.

The *International Harvester* case, *supra,* involves the only transaction which is similar to the Class E transaction. It, in one classification, involved the sale of Indiana goods to an out of state purchaser who entered Indiana to take delivery. Class E transactions differ from those in the *International Harvester* case because the coal is not Pittsburgh coal or even Pennsylvania coal but is West Virginia coal shipped through Pennsylvania back to West Virginia.

In *Interstate Oil Pipe Line Co., supra,* the tax was levied on the gross receipts of a corporation engaged in transporting oil from one place in the taxing jurisdiction to another place in the taxing jurisdiction. Although the oil was destined for consumers outside the taxing jurisdiction the pipe line was not in interstate commerce. The gross receipts were derived from the use of the pipe line and were not derived from the sale of goods which moved in interstate commerce. In Class E transactions the subject of the sale is coal which moves in interstate commerce and is clearly different from the use of a pipe line.

This Court should not sustain a gross receipts tax on sales of coal which are admittedly transactions in interstate commerce where the only time the goods

enter Pennsylvania is during their continuous interstate journey. It is submitted that a stoppage outside the taxing jurisdiction should not give the City and School District of Pittsburgh the right to tax these interstate transactions.

II. Each of the transactions herein classified is in interstate commerce and can not be subjected to the gross receipts tax levied here.

The statutes, ordinances and regulations under which the mercantile taxes are imposed all recognize that the commerce clause of the Federal Constitution limits the scope of the taxes. Section 12 (b) of the Act of June 20, 1947, P.L. 745, as amended, (Pa. Stat. Ann. tit. 24 § 582.12 (b)) Section 11 (a) City of Pittsburgh Ordinance No. 488 of 1947.

The mercantile taxes which the City and School District of Pittsburgh seek to impose are direct taxes which cannot constitutionally be imposed upon the gross receipts of an interstate activity. A careful consideration by this Court of the effect of the commerce clause on local gross receipts taxation of interstate activity is found in the case of *Freeman v. Hewit,* 329 U.S. 249 (1946), which involved the Indiana gross income tax.

In *Freeman v. Hewit, supra,* the taxpayer, an Indiana trustee of an Indiana estate, arranged with his Indiana broker to sell certain securities of the estate. The Indiana broker, through his New York correspondent, sold the securities on the New York Stock Exchange. The taxpayer thereupon delivered the securities to the broker for transmittal to the New York correspondent for the delivery to the purchaser.

Argument.

This Court in an opinion by Mr. Justice Frankfurter held that the imposition of the gross receipts tax on the sale was unconstitutional. The decision also discarded the multiple burden theory for determining the validity of state taxes.

The opinion started with the proposition that the Commerce Clause of the United States Constitution by its own force created an area of trade free of interference by the States (329 U.S. at p. 252). It then stated that a gross receipts tax was a direct tax which created an inherent danger to commerce and constituted a greater burden on commerce than an indirect tax (329 U.S. at p. 253). The Court held that a tax on the gross receipts of an interstate sale is a direct tax on interstate commerce and is unconstitutional and it is immaterial that local commerce is subjected to the same tax. Mr. Justice Frankfurter added that sales and use taxes should be treated differently from gross receipts taxes. The former are a burden on the consumer who is a resident of the taxing jurisdiction, while the latter are a direct burden on commerce.

In all the transactions in the case at bar the taxing authorities have attempted to impose a direct unapportioned gross receipts tax on the receipts from interstate sales. Such a tax is unconstitutional. *Freeman v. Hewit, supra.*

We submit that *Freeman v. Hewit, supra,* and the later case of *Joseph v. Carter and Weekes Stevedoring Co.,* 330 U.S. 422 (1947), discarded the multiple burden test. The transactions in the case at bar are controlled by *Freeman v. Hewit* and not the earlier cases decided by this Court during the period from 1938 to 1944, beginning

with *Western Live Stock v. Bureau of Revenue,* 303 U. S. 250 (1938), and ending with *International Harvester Co. v. Department of Treasury,* 322 U.S. 340 (1944).

Secondly, it is submitted that even if the multiple burden theory of taxation is found to have any validity it should not be used as a general proposition but be examined in the light of the specific cases in which it was applied. When this is done, it is apparent as shown in Argument I of this Petition that the cases are not applicable to the transactions in this case.

When the transactions of the case at bar are examined, it is clearly evident that they are not subject to the gross receipts tax levied here.

Conclusion.

It is submitted that the decision of the Pennsylvania Supreme Court in upholding the gross receipts taxes levied by the City of Pittsburgh and the School District of Pittsburgh is in conflict with the applicable decisions of this Court.

It is further submitted that this case with its six different classifications presents a unique opportunity for this Court to clarify the law with respect to local taxation of transactions in interstate commerce.

Therefore Petitioner prays that this Court grant its Petition for Certiorari.

Respectfully submitted,

THE WIEMAN AND WARD COMPANY, Petitioners

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APPENDIX A

Opinion of the Trial Court and Order.

Marshall, J.

A proper understanding of the facts of this case is very important. Therefore, we have decided to give both the plaintiff and defendant's statement of facts.

PLAINTIFF'S STATEMENT OF FACTS

The case at bar presents the question of the effect of the Commerce Clause of the Constitution of the United States of America on the rights of the defendant City and School District to impose "mercantile taxes" upon the gross receipts of the plaintiff taxpayer arising out of certain transactions.

The Defendant, City of Pittsburgh, by virtue of Act No. 481 of the General Assembly of Pennsylvania of June 25, 1947, P. L. 1145 (53 P. S. 2015.1 et seq) enacted Ordinances Nos. 488 and 489 of 1947 imposing a mercantile license tax at the rate of one mill on each dollar of the volume of annual gross business transacted during the preceding year by wholesale vendors of or dealers in goods, wares, or merchandise.

Section 11 (a) of Ordinance No. 488 provides that it shall not be construed to empower the city to collect taxes not within the taxing powers of the City under the Constitution of the United States.

The defendant School District of the City of Pittsburgh, by virtue of Act No. 320 of the General Assembly of Pennsylvania of June 20, 1947, P.L. 745 (24 P.S. 582.1 et seq), imposes an annual mercantile license tax upon

wholesale vendors of or dealers in goods, wares, or merchandise at the rate of one-half mill on each dollar of the volume of annual gross business.

Section 12 (2) of Act No. 320 provides that the statute should not be construed to impose the tax on any business or portion of business not within the taxing powers of the Commonwealth of Pennsylvania under the Constitution of the United States.

The plaintiff, a Pennsylvania corporation with its principal place of business in the City of Pittsburgh, is engaged in the business of wholesale vendor of or dealer in coal, coke and pig iron.

The sources of plaintiff's coal and coke are mi[ne]s and ovens in the states of West Virginia, Kentucky, and Pennsylvania.

There are no other major coal mining states in this part of the country. Consumers of plaintiff's coal are located in almost every state of the United States east of the Mississippi.

The function of the Wieman and Ward Company in the coal industry is twofold. First, it serves as a selling agent for coal producers who, because of size or other economic reasons, cannot sell directly to the consumer.

Secondly, the Weiman and Ward Company acts as a purchasing agent for those brokers or consumers who, for economic reasons, cannot deal directly with the producers. Through its contracts with both the producers and the purchasers the plaintiff enables the purchasers to obtain a source of supply and the smaller producers to obtain a market which enables them better to compete with the large producers.

Plaintiff's testimony developed the fact that coal produced in one state or even from one mine within one state is unique. The coal from one mine might be suitable for certain purposes and wholly unsuited for others. Because of this fact and because the consumers of coal are located in many states it is apparent that plaintiff's business crosses state borders.

The question for the court to determine is what portion of plaintiff's business is in interstate commerce and protected from defendants' taxing powers by the Commerce Clause of the Federal Constitution.

DEFENDANTS' STATEMENT OF FACTS

The facts are undisputed. They were related by witnesses for plaintiff. The defendants offered no evidence.

The City of Pittsburgh imposed a mercantile tax by its Ordinance No. 488, approved December 1, 1947. This levies a tax of one mill on sales at wholesale of goods, wares and merchandise in the City. In the case of retail merchants the rate of the tax is two mills on gross volume of business. The tax is measured by volume of business done in the year prior to the tax year. The tax ordinance was enacted by the City pursuant to the authority bestowed upon it by the Act of June 25, 1947, P.L. 1145 (No. 481), (53 P.S. 2015.1.)

Article 1, Section 8, clause 3, of the Constitution of the United States, provides that the congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian Tribes. The several courts of the United States and of the states

have held that because of this provision no state and no municipality may unduly burden any such commerce.

The city asserts that its tax as levied against plaintiff does not transgress this clause. Its position, as established by the authorities hereinafter discussed, is that interstate commerce is involved only when an out-of-state buyer purchases merchandise from a Pittsburgh seller, and pursuant to this contract of sale the goods are shipped from the seller across the state line to the buyer. The plaintiff apparently takes the position that the City is barred from its tax in any case where the goods involved cross a state line regardless of the number of parties to the transaction or their respective locations. This position is not supported by the authorities.

Wieman and Ward Company, the plaintiff, is a Pennsylvania corporation with a place of business in the Oliver Building, Pittsburgh, Pa. It is a wholesale dealer in coal, coke and pig iron. It is admittedly subject to the City mercantile tax and, accordingly, it took out mercantile licenses for the years involved in these suits. It also paid the tax on a portion of its gross receipts. Thereafter, the City audited the books of the Company and assessed it for additional taxes. The amounts paid by plaintiff for the several years and the additional assessments made by the City are as follows:

Year	*Amount paid*	*Additional Assm't*	*Total Claimed by City*
1948	$1,562.55	$2,661.01	$4,223.56
1949	1,828.84	2,776.17	4,605.01
1950	1,412.30	1,067.99	2,480.29
1951	3,457.02	1,601.12	5,058.14

Appendix A

The City's claim for additional taxes is based upon receipts from certain transactions which it claims plaintiff wrongfully excluded. There are seven types of transactions which plaintiff claims are not subject to tax and where the City takes a contrary view. Counsel for plaintiff offered in evidence as Exhibit "1" a breakdown of the various transactions and receipts from each type for the various years. It will be noted by referring to the Exhibit that the amount of tax is always one and one-half times the sum claimed by the City. The reason for this is that the amount shown on the Exhibit includes the School District tax, which is one-half the amount of the City tax.

The various transactions are summarized below but the figures are not added since they are agreed to and actually have no bearing on the legal question:

A. Sale by plaintiff to Pennsylvania customer for shipment to the customer's customer out of the state. The product sold was supplied by an out-of-state mine and shipped direct to the ultimate consumer.

B. Same as above except mine is in Pennsylvania. Product shipped from Pennsylvania mine to customer's customer out of the state.

C. Sale by plaintiff to out-of-state customer (B. & O. R. R.) for shipment to the customer in Pennsylvania. In this case the supplier is out of the state and shipment is made from the supplier to the Pennsylvania destination.

D. Sales by plaintiff to Pennsylvania customer where the goods are purchased by plaintiff from

an out-of-state source of supply and delivered by the supplier direct to the customer in Pennsylvania.

E. Sale by plaintiff to out-of-state buyer where the goods are delivered to the buyer in Pennnsylvania. The coal or coke is purchased from an out-of-state supplier and shipped by the supplier to the buyer in Pennsylvania.

F. Same as above except that in this case the supplier is within the Commonwealth of Pennsylvania.

G. Sales to Pennsylvania Railroad at Pittsburgh or Philadelphia for shipment over the Railroad's system when needed. In this case the supplier is in Pennsylvania.

The nature of plaintiff's business and the various transactions were elucidated by Norman L. Parkins, Vice-President of plaintiff, and by Carl B. Freed, Assistant Treasurer, both of whom testified for plaintiff.

Mr. Parkins stated that the Company buys the output of certain mines in Pennsylvania, West Virginia and Kentucky. It sells to steel companies and to public utilities. When the customer orders coal he usually specifies the mine from which the coal he buys is to be produced.

Wieman and Ward employ eight salesmen, five of whom operate in the Pittsburgh territory, one in Cincinnati, one in New York and one other.

Mr. Freed gave examples of the several types of transactions which were listed in Exhibit "1". An example of Class A sales is as follows:

Appendix A

The H. C. Frick Coke Company, a Pittsburgh concern, purchases 15,000 tons of coal from plaintiff, specifying the mine from which the coal is to be procured. The purchaser directs that the coal shall be shipped to Frick's customer, the National Tube Company, at Lorain, Ohio. Dalton [C]oal Sales Company, located outside of Pennsylvania, receives the order from plaintiff and ships the coal to National Tube pursuant to instructions. Dalton sends plaintiff a shipping notice. Dalton bills plaintiff for the price of the coal and plaintiff in turn bills Frick. Class B sales are similar except that the coal is mined in Pennsylvania.

Under Class C sales plaintiff receives an order for coal from the Baltimore and Ohio Railroad Company's agent in Baltimore, Maryland. The order specifies where the coal is to be mined. The purchaser notifies the producing company to deliver the coal to a weigh station in Pennsylvania.

Under class D sales plaintiff will receive an order from the Jones and Laughlin Steel Company, a Pittsburgh concern. The order specifies that the coal is to be mined at Rock Forge Ovens in Morgantown, W. Va. It also directs that the coal is to be delivered to Jones and Laughlin Steel Company at its Aliquippa, Penna., plant. The transaction is fulfilled on these terms, Rock Forge shipping the coal from Morgantown, W. Va., to Aliquippa, Pa.

Class E. Sales: Weirton Steel Company of Weirton, W. Va., orders coal from plaintiff to be produced at the Yale mine in West Virginia and to be delivered to Weirton at Isabella, Pa. The transaction is carried out

according to these arrangements, Yale mine shipping the coal to the purchaser at Isabella, Pa.

Class F sales: Here again Weirton Steel Company is the purchaser. The only difference between Class E sales and Class F sales is that in Class F sales the coal is mined in Pennsylvania and delivered to Isabella, Pennsylvania. Plaintiff asserts that interstate commerce is involved here because at Isabella the coal is transferred from trucks to barges and then moved by river to the buyer's plant in West Virginia.

Class G. Sales: The Pennsylvania Railroad Company orders coal to be delivered in Pennsylvania for use in its system. Plaintiff asserts that interstate commerce is involved here because the buyer's trains move through several states. The City taxed receipts from such sales only where delivery was effected in Pennsylvania. Where an order called for delivery to the buyer in Columbus, Ohio, the receipts from the transaction were excluded by auditors for the City.

From the above list it would appear that there are many and complicated problems in the case. This is really not so. It is believed that the solution of one problem will greatly simplify the others. Also, there is one element in the above examples which counsel for the City believes to be immaterial, namely, the location of the supplier. In examples, A, C, D, and E, above, the supplier is out of the state. Counsel for the City believes it is well established that this is immaterial. If problems arising from this element may be eliminated the way to a decision of the case will be simplified.

Appendix A

DISCUSSION

The plaintiff claims interstate commerce; the city Defendant denies that it has imposed its tax on any receipts resulting from transactions moving interstate commerce. The plaintiff has submitted a brief covering 26 pages, and the defendant has submitted one of the same length. To quote all of the authorities and try to distinguish them would make necessary an opinion which would be a book in length, and would only be confusing.

The statutes, ordinances and regulations under which the mercantile taxes are imposed all recognize the fact that the commerce clause of the Federal Constitution limits the scope of the taxes.

Section 12 (b) of the Act of June 20, 1947, P.L. 745, as amended, 24 P.S. 582.12 (b), under which the School District taxes are imposed, provides as follows:

> "b. Nothing contained in this act shall be construed to empower any school district of the first class to levy and collect the taxes hereby imposed on any person or on any business or any portion of any business not within the taxing power of this Commonwealth under the Constitution of the United States."

We feel that the case of Freeman v. Hewit, 329 U.S. 249 (1946) which involved the effect of the Commerce clause, is controlling. Here, the Supreme Court held that gross receipts taxes are direct taxes and that direct taxes on interstate commerce are unconstitutional. In this case an Indiana trustee of an Indiana estate, arranged with his Indiana broker to sell certain securities of the estate. The broker, through his New York correspond-

ent, sold the securities on the New York Stock Exchange. The securities were sent to the New York correspondent to be given to the purchaser. Justice Frankfurter held that the tax was unconstitutional. Mr. Justice Rutledge wrote a concurring opinion. We also cite the case of International Harvester Co. v. Dept. of Treasury, 322 U. S. 340. In that case, several classes of sales made by International Harvester Co., which had places of business in Indiana, were subject to the Indiana gross receipts tax. The Supreme Court found the tax valid in each class and based its decision on the consummation of the transaction, delivery of the goods, in Indiana.

We therefore believe that any tax on Interstate Commerce is unconstitutional. We do not believe the tax is unconstitutional as to coal mined in Pennsylvania and sold in Pennnsylvania, even if it is to a customer in Pennsylvania who in turn intends to sell it to some customer over a state line.

ORDER OF COURT

And now, to-wit; Feb. 18, 1952, we hereby order and direct that all of the within taxes except those where purchase is made in Pennsylvania and sold in Pennsylvania and sold in interstate commerce are not subject to taxation by the defendants.

BY THE COURT,

Eo die, exception noted and bill sealed.

T. M. MARSHALL (Seal)
Judge.

Appendix A

Opinion of the Court en Banc and Order.

Before: Marshall, Ellenbogen and O'Brien, JJ.

Marshall, J.

For the benefit of my colleagues I will give a short statement of the facts.

The case at bar presents the question of the effect of the Commerce Clause of the Constitution of the United States of America on the rights of the defendant City and School District to impose "mercantile taxes" upon the gross receipts of the plaintiff taxpayer arising out of certain transactions.

The defendant, City of Pittsburgh, by virtue of Act No. 481 of the General Assembly of Pennsylvania of June 25, 1947, P. L. 1145 (53 PS 2015.1 et seq.) enacted Ordinances Nos. 488 and 489 of 1947 imposing a mercantile license tax at the rate of one mill on each dollar of the volume of annual gross business transacted during the preceding year by wholesale vendors of or dealers in goods, wares, or merchandise.

Section 11 (a) of Ordinance No. 488 provides that it shall not be construed to empower the city to collect taxes not within the taxing powers of the City under the Constitution of the United States.

The defendant School District of the City of Pittsburgh, by virtue of Act No. 320 of the General Assembly of Pennsylvania of June 20, 1947, P. L. 745 (24 PS 582.1 et seq.), imposes an annual mercantile license tax upon wholesale vendors of or dealers in goods, wares, or merchandise at the rate of one-half mill on each dollar of the volume of annual gross business.

The sources of plaintiff's coal and coke are mi[ne]s and ovens in the states of West Virginia, Kentucky and Pennsylvania.

The function of the Weiman and Ward Company in the coal industry is twofold. First, it serves as a selling agent for coal producers who, because of size or other economic reasons, cannot sell directly to the consumer.

Secondly, the Wieman and Ward Company acts as a purchasing agent for those brokers or consumers who, for economic reasons, cannot deal directly with the producers.

The facts are not in dispute. The city asserts that its tax as levied against plaintiff does not transgress this clause. There are seven types of transactions which plaintiff claims is not sufficient to tax where the City takes a contrary view.

All of these cases were tried together and the defendant has filed exceptions to the Adjudication of the Court. Defendants except to the final order of Court which reads as follows:

> "And now, to-wit; February 18, 1952, we hereby order and direct that all of the within taxes except those where purchase is made in Pennsylvania and sold in Pennsylvania and sold in interstate commerce are not subject to taxation by the defendants."

Defendant relies to some extent on the opinion of Judge Adams in the Keystone case which is now before the Supreme Court. There are other cases cited by the Defendant which we will not refer to inasmuch as we felt we were controlled by the Hewitt case: 329 U. S.

249. The defendant's second proposition seems to be that even if plaintiff's transactions are not Interstate Commerce the mercantile tax can constitutionally be imposed. The Freeman vs. Hewitt case, 329 U. S. 249 involved the effect of the Commerce Clause. In the Keystone case copper scrap was delivered to New Jersey for refinement there and shipment as refined copper to rolling mills in other states. In the case at bar, the coal was to be consumed in the state of its destination. We therefore believe that any tax on interstate commerce is unconstitutional. We do not believe the tax is unconstitutional if coal is mined in Pennsylvania and sold in Pennsylvania even if it is in turn sold to a customer in Pennsylvania who in turn intends to turn it over to a customer in another State. It seems to us that it would be a waste of time, money and effort to argue this case in the Supreme Court before the decision in the case now before the Supreme Court is handed down. This is merely a suggestion and is not binding on either party. When the decision in the Keystone case is handed down if the parties wish to have this case reargued we will be glad to hear same. The exceptions will be dismissed.

ORDER OF COURT

And now, to wit; June 2, 1953 defendant's exceptions are hereby dismissed.

By the Court,
T. M. M.

Eo die, exception noted and bill sealed.

T. M. MARSHALL [SEAL]
Judge.

Opinion of the Court en Banc and Order.

Before: Marshall, Weiss and Duff, JJ.

Marshall, J.

FINDINGS OF FACT

1. Plaintiff is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal place of business in the Oliver Building, Pittsburgh, Pennsylvania.

2. The defendant, City of Pittsburgh, is a municipal corporation and a city of the second class under the laws of the Commonwealth of Pennsylvania.

3. The defendant, James P. Kirk, is the Treasurer of the City of Pittsburgh and as such is empowered and directed to enforce the City's ordinances hereinafter referred to.

4. The defendant, the School District of Pittsburgh, is a school district of the first class of the Commonwealth of Pennsylvania, and the defendant, James P. Kirk, is the Treasurer of said school District.

5. Plaintiff is engaged, inter alia, in the business of wholesale vendor of or dealer in coal, coke and pig iron.

6. In the course of said business Plaintiff purchases coal, coke and pig iron in various states in the United States, including Pennsylvania, sells the coal, coke and pig iron to dealers and manufacturers in various states of the United States, including Pennsylvania, and arranges for the delivery of the coal.

7. Cities of the second class, among other municipal corporations and political subdivisions, are au-

horized by Act No. 481 of the General Assembly of Pennsylvania, approved June 25, 1947, to levy, assess and collect taxes on such persons, transactions, occupations, privileges, subjects and personal property as the municipality shall determine, excepting those subject to a state tax or license fee.

8. Council of the City of Pittsburgh by its Ordinances Nos. 488 and 489, approved December 1, 1947, provided, for the issuance of mercantile licenses for the year 1948 and annually thereafter to persons engaged in certain occupations and businesses upon payment of certain fees therefor and levied for the year 1948 and annually thereafter a mercantile license tax at the rate of one mill on each dollar of volume of annual gross business transacted.

9. Section 11 (a) of said Ordinance No. 488 provides, as follows:

> "Nothing contained in this ordinance shall be construed to empower the City to levy and collect the taxes hereby imposed on any person, or any business, or any portion of any business not within the taxing power of the City under the Constitution of the United States and the laws and Constitution of the Commonwealth of Pennsylvania."

10. Pursuant to said Ordinances, the defendant, James P. Kirk, Treasurer of the City of Pittsburgh, issued Mercantile License Tax Regulations, effective January 1, 1948.

11. Act No. 320 of the General Assembly of Pennsylvania, approved June 20, 1947 provides that every school district of the first class shall issue mercantile

licenses and levy and collect an annual mercantile license tax in the manner at the rates therein set forth upon wholesale vendors of or dealers in goods, wares and merchandise, and requires said vendors of or dealers in goods, wares and merchandise to procure on or before the first day of January of each year a mercantile license for its place of business upon the payment of a prescribed license fee and to pay an annual mercantile license tax at the rate of one-half mill on each dollar of the volume of the annual gross business transacted.

12. Nothing contained in said Act shall be construed to empower any school district of the first class to levy and collect the taxes thereby imposed on any person, or on any business, and that it is the intent of the General Assembly that no taxes are to be imposed upon under said Act in violation of the provisions of the Constitution of the United States or of the Constitution of the Commonwealth of Pennsylvania.

13. Plaintiff applied and paid for mercantile licenses for the years 1948, 1949, 1950 and 1951, which were issued by Defendants.

14. Plaintiff filed with Defendants Mercantile Tax Returns for the years 1948, 1949, 1950 and 1951.

15. Following an examination of Plaintiff's records, Defendants assessed Plaintiff for the years 1948, 1949, 1950 and 1951 additional mercantile tax together with penalty at the rate of 1% per month and interest at the rate of ½% per month.

16. The dispute between the parties is as to whether sales in the total amount of $8,546,019.69 for the

taxable years 1949, 1950 and 1951, should be included in computing mercantile taxes.

17. Plaintiff filed bills of complaint in equity praying that the aforesaid assessments made by the Defendant City be declared null and void and of no effect whatever and for such other further relief as may be deemed proper.

18. Plaintiff filed petitions for appeal from Assessments of Mercantile License Taxes of the Defendant School District and obtained orders of the Court of Common Pleas of Allegheny County awarding issues between Plaintiff and Defendant School District.

19. By stipulation of the parties all of the aforesaid suits against the Defendant City and all of the aforesaid appeals from the assessments of the Defendant School District were joined together.

20. Plaintiff and defendants agree that the receipts from certain types of transactions of the Plaintiff are exempt from mercantile taxes under the applicable Ordinances of the City of Pittsburgh, and the applicable statutes of the Commonwealth of Pennsylvania for the reason that these transactions were in interstate commerce or otherwise protected by provisions of the Constitution of the Commonwealth of Pennsylvania.

21. *Class A*: These transactions consist of sales from out-of-state mines and ovens to Pennsylvania companies for delivery directly to third parties out of state. The coal or coke never enters the State of Pennsylvania except for through transportation in certain instances.

22. *Class B*: These transactions consist of sales from Pennsylvania mines and ovens to dealers in Penn-

sylvania but delivered directly to third parties out of state. There is no delivery in Pennsylvania.

23. *Class C*: These transactions consist of sales from out of state mines to out of state purchasers for delivery to scales in Pennsylvania. The purchaser specifies the source of the coal which he wishes to purchase, the negotiations for these sales were carried on out of state and the orders were placed from out of state.

24. *Class D*: These transactions consist of sales from out of state mines and ovens to Pennsylvania companies for delivery to them or their customers in Pennsylvania.

25. *Class E*: These transactions consist of sales from out of state Mines to Weirton Steel Company, Weirton, West Virginia. The contract required plaintiff to load West Virginia coal into Weirton barges at loading points along the Monongahela River in West Virginia. The layover at Isabella, Pennsylvania, was no longer than necessary to complete the loading of the barges.

26. *Class F*: These transactions consist of sales from Pennsylvania mines to Weirton Steel Company, Weirton, West Virginia. The contracts, which were negotiated in Weirton, West Virginia, required Plaintiff to ship the coal from the mines by truck for loading into Weirton barges for immediate shipment to Weirton, West Virginia for use there.

27. *Class G*: These transactions consist of sales from Pennsylvania mines and ovens to railroads in Pennsylvania for delivery to them at their nearest scales.

28. The function of the Weiman and Ward Company in the economy of the coal industry, in so far as its purchasing is concerned, is to provide a market for coal mining companies which, because of their size or other economic reasons, do not or cannot market their own product. The plaintiff Company makes purchases from mining companies in four states of the United States.

29. The function of the Weiman and Ward Company in the economy of the coal industry, in so far as its selling is concerned, is to provide a source of supply for two classes or purchasers; first, those whose needs are so small that it is uneconomic to deal directly with producers and, second, those purchasers whose needs are so large that they need the outlet of many producers. Weiman and Ward solicit orders in many states and Canada and make deliveries to many states and Canada.

CONCLUSIONS OF LAW

One. The Court has jurisdiction over the defendants, whether the Bills of Complaint be considered as suits in equity or as appeals from assessments and as to all taxable years involved by stipulation of the parties.

Two. The Court has jurisdiction over the Defendants, and as to all taxable years involved by stipulation of the parties.

Three. The City of Pittsburgh mercantile tax is a gross receipts tax at the rate of one mill on each dollar of volume of annual gross business transacted during the preceding year by vendors of or dealers in goods, wares and merchandise.

Four. The School District of Pittsburgh mercantile tax is a gross receipts tax at the rate of one-half mill on each dollar of volume of annual gross business transacted during the preceding year by vendors of or dealers in goods, wares and merchandise.

Five. A tax on the gross receipts from an interstate transaction is a direct tax on interstate commerce itself and is unconstitutional.

Six. It is immaterial that local commerce is subjected to the same tax.

Seven. Because of the greater or more threatening burden of a direct or gross receipts tax, which is imposed whether the commerce results in a profit or loss, and because of the lesser need to the defendants for the particular source of revenue, such taxes should be scrutinized most carefully where the transactions upon which they are imposed involve more than one state.

Eight. Taxes like sales and use taxes, which are a burden on the consumer who is a resident of the taxing jurisdiction, should be treated differently from gross receipts taxes, which are a burden on commerce.

Nine. Gross receipts taxes on sales where the goods are transported across state borders are permissible only where all of the following factors are present: a. On orders solicited in the taxing jurisdiction; and b. Where the contracts were entered into in the taxing jurisdiction; and c. Where the seller maintained a place of business in the taxing jurisdiction; and d. Where the orders may be filled as readily from intrastate as extrastate goods, and e. Delivery is made

to the purchaser in the taxing jurisdiction either (1) directly from such extra-state source or, (2) by relay through the offices of the seller in the taxing jurisdiction; and f. The delivery to the purchaser in the taxing jurisdiction is for consumption by the purchaser; and g. Provided that no congressional enactment or policy is thereby offended.

Ten. Wherever transactions involve more than one state, unless the involvement of more than one state is purely voluntary, the transactions are in interstate commerce and receipts therefrom are exempt from defendants' mercantile taxes.

Eleven. Receipts from Class A transactions, where coal from an out of state source as required by the purchaser, is supplied directly to an out of state consumer, at the direction of a Pennsylvania purchaser, are from interstate commerce and not taxable.

Twelve. Receipts from Class B transactions where Pennsylvania coal is supplied directly from mine to an out of state consumer, at the direction of a Pennsylvania purchaser, are from interstate commerce and not taxable.

Thirteen. Receipts from Class C transactions, where pursuant to negotiations carried on and a contract entered into out of state, out of state coal, as required by an out of state purchaser, is delivered to a Pennsylvania destination, are from interstate commerce and not taxable.

Fourteen. Receipts from Class D transactions, where out of state coal, as required by a Pennsylvania

purchaser, is delivered to a Pennsylvania destination, are from interstate commerce and not taxable.

Fifteen. Receipts from Class E transactions are from interstate commerce and not taxable for the same reasons that receipts from Class [A] transactions are not taxable. The shipment of coal in Class E transactions was a through shipment from an out of state source, to an out of state destination, at the direction of an out of state purchaser, in accordance with a contract made out of state. The interstate character of this transaction was not altered by the temporary stoppage at Isabella, Pennsylvania. Commerce begins when the movement of the product begins, and ends when the product comes to rest at its destination. The interstate character of the commerce is not affected by temporary breaks in the transportation at intermediate points which are necessary or convenient to the promotion of further transportation. Commerce is ended only when, at the time of the temporary stoppage, the ultimate destination or use of the property cannot be determined. Such is not the situation in Class E transactions.

Sixteen. Receipts from Class F transactions are from interstate commerce and not taxable for the same reasons that receipts from Class B transactions are not taxable. The shipment in Class F transactions was a through shipment from a Pennsylvania source, to an out of state destination, at the direction of an out of state purchaser, pursuant to a contract made out of state. The interstate character of the transaction was not affected by the temporary stoppage at Isabella, Pennsylvania.

Seventeen. Receipts from Class G transactions, where Pennsylvania coal is sold to Pennsylvania railroads, and from intrastate commerce and are taxable.

Eighteen. Plaintiff is legally and equitably entitled to the relief prayed for in the Bills of Complaint and the Petitions for Appeal, except in so far as receipts from Class G transactions are involved.

Nineteen. The assessments by the Defendants, plus proportionate shares of penalty and interest are null and void and of no affect whatever, as follows:

Taxable years 1948, 1949 1950, 1951	*City of Pittsburgh*	*School District of Pittsburgh*
Class A	$2,890.85	1,445.43
Class B	391.03	195.52
Class C	4.17	2.08
Class D	3,288.38	1,644.19
Class E	44.96	22.48
Class F	645.65	327.83
Total	$7,265.04	3,637.53
Proportionate share of Penalty and Interest	1,923.21	962.93
Total	9,188.25	4,600.46

The above suits were instituted by the plaintiff to determine the liability of the mercantile tax to the City of Pittsburgh. The questions in the three cases are the same and they were tried together.

Appendix A

The School District of Pittsburgh has a mercantile tax similar to that imposed by the City of Pittsburgh. The School Tax is imposed by the Act of June 20, 1947, P. L. 745. The School District cases bear the following numbers and terms: 2015 January, 1951; 2604 January, 1951; 2169 July Term, 1951. These cases were tried with the City cases since the issues to be determined are identical.

STATEMENT OF FACTS

The facts are undisputed. Defendants offered no evidence. The City of Pittsburgh imposed a mercantile tax by City Ordinance 488 approved December 1, 1947. The tax is measured by volume of business done in the year prior to the tax year. Article I, Section 8, Clause 3 of the Constitution of the United States provides that the Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian Tribes. The several courts of the U. S. have held, together with the states, that because of this provision no state and no municipality may unduly burden any such commerce. The defendant City claims that the tax does not transgress this clause. The case at bar came before this court for reargument. The Chancellor filed an adjudication. Both sides filed exceptions. The plaintiff's exceptions related to the failure of the court to file Findings of Fact and Conclusions of Law. The reason for this was that the opinion of the court was to request the parties to wait the final determination of the case then in the Supreme Court, namely, the case of Keystone Metal Company vs. City of Pittsburgh, 374 Pa. 323. It was the opinion of this court that this court should not arrive at a

ruling opposite from the Supreme Court if the facts were the same.

A brief statement of the facts is necessary. The plaintiff company operates a business as a wholesale vendor and dealer in coal and coke. Sources of coal are mined in the States of West Virginia, Kentucky and Pennsylvania, and their customers are located in most eastern states. Plaintiff stresses the fact that coal produced in one state or even from one mine is unique, inasmuch as certain mines have certain qualities which are suitable for some uses and unsuitable for others. Inasmuch as the consumers are located in different states a large percentage of plaintiff's business is interstate. This leads to a dispute of seven different types of transactions conducted by plaintiff. These transactions can be summarized as follows:

A. Class A transactions consist of sales from out of state mines and ovens to Pennsylvania companies for delivery directly to third parties out of state. The coal or coke never enters the state of Pennsylvania. The purchaser specifies the source of the coal or coke which he wishes to purchase.

B. Class B transactions consist of sales from Pennsylvania mines and ovens to dealers in Pennsylvania but delivered directly to third parties out of state. There is no delivery in Pennsylvania.

C. Class C transactions consist of sales from out of state mines to out of state purchasers (the Baltimore and Ohio Railroad in all instances) for delivery to scales in Pennsylvania. The purchaser specifies the source of the coal which he wishes to

purchase, the negotiations for these sales were carried on out of state and the orders were placed from out of state.

D. Class D transactions consist of sales from out of state mines and ovens to Pennsylvania companies for delivery to them or their customers in Pennsylvania. The purchaser specifies the source of the coal or coke which he wishes to purchase.

E. Class E transactions consist of sales from out of state mines to Weirton Steel Company, Weirton, West Virginia. The contract which was negotiated in Weirton, required plaintiff to load West Virginia coal into Weirton barges at loading points along the Monongahela River in West Virginia. The barges would be loaded as fully as water conditions on the river would permit and then delivered to Weirton's loading station at Isabella where, because of greater river depth the barges would be completely loaded with Weirton Coal by Weirton and then towed direct to the Weirton Steel Company at Weirton, West Virginia. The layover at Isabella, Pennsylvania was no longer than necessary to complete the loading of the barges.

F. Class F transactions consist of sales from Pennsylvania mines to Weirton Steel Company, Weirton, West, Va. The contracts there were negotiated in Weirton, West Va. required plaintiff to ship the coal from the mines by truck for loading into Weirton Barges for immediate shipment to Weirton, W. Va., for use there.

G. Class G transactions consist of sales from Pennsylvania mines and ovens to railroad in Pennsylvania for delivery to them at their nearest scales. Plaintiff admits that receipts from these transactions are taxable.

The Trial Court affirmed by the court en banc decided that all of the foregoing transactions with the exception of Class G were interstate commerce and exempt from mercantile taxation. A reargument was ordered and we now decide that the plaintiff's exceptions should be sustained and the trial court's adjudication should be reformed so as to include findings of fact and conclusions of law. Since the opinion in the Keystone Metal case, several cases have arisen in New York state involving the commerce clause in situations similar to the case at bar. We refer to the case of United Airlines, Inc. v. Joseph, 282 Appellate Division, 1948, decided in 1953, and the case of United Dye Works v. Joseph, 282 App. Div. 60, decided in 1953.

The Appellate Division of the New York Court held that the local tax could not be imposed. The tax in the case at bar is illegal and the affirmation of the Chancellor should be affirmed. The syllabus of the Keystone Metal Company case reads as follows:

"Where it appeared that sales of copper scrap were made by a Pittsburgh seller to Pittsburgh buyers, it was held that such sales were transactions properly includible as gross receipts under the mercantile license taxes of the City of Pittsburgh and the School District of Pittsburgh, even though the subject matter of the transactions never came into Pennsylvania but was delivered directly from out of

State suppliers to buyers outside the State not affiliated with either the seller or the buyers.

It was held that the tax was not invalidated by the fact that the tax base was greater by reason of the inclusion therein of the cost of the interstate transportation.

A provision in the regulations of the City and School District that the taxpayer's receipts are excluded if the seller agrees to and does deliver the property to a purchaser at a point outside Pennsylvania was held to refer to a purchaser located outside Pennsylvania.

It was held that an interest charge of 6% per annum and a penalty of 1% per month on the deficiency in the tax payments were not unduly harsh, and that the court below erred in relieving the taxpayer, who was testing the validity of the ordinance, from their payment.

Although a transaction viewed as a whole may be one in interstate commerce, there may be certain intrastate events or local activities in connection therewith that permit the imposition of a state tax.

The solution of the question whether a state tax falls within the latter category depends entirely on the particular facts in each instance and may, admittedly, require the drawing of nice distinctions. In cases involving the legality of state taxation the question is not determined by the broad concept of what constitutes interstate commerce when problems of state regulation are concerned; it depends rather on whether there are sufficient local incidents to validate the tax, even though the total activities

from which the transaction arises may have incidental interstate attributes."

Inasmuch as this opinion deals almost entirely with the question as to whether or not the Keystone case is controlling, we have quoted this case at length. The Keystone Metal Company purchased scrap in Pennsylvania and other states. They directed that the product be shipped directly to a refinery. In the case at bar the coal had to come from a particular mine. We believe that interstate commerce was essential in this case and not incidental to the local transaction. We understand that any State in which the coal is mined can impose a tax. We cite the case of Corey vs. Independent Ice Company, 207 Federal 459. In the instant case there was no shipment of the coal across State Borders by the purchaser. Contracts for the purchase of coal were made by the purchaser out of Pittsburgh and out of Pennnsylvania. Contracts were consummated there and the coal never came here nor did it come to Pennsylvania. We therefore believe that the transactions in the instant case were essentially different than the transactions in the Keystone case. For these reasons we reaffirm our opinion originally made in the first adjudication. Defendants have filed exceptions but they are really covered in the body of the opinion in this case. Objection is made to the order of court. We have gone into this at length in the original adjudication, and to some extent in the adjudication, and to some extent in the adjudication filed after the reargument and to discuss the matter any more thoroughly would be needless in our opinion.

Judge Duff partially dissents believing that Class A, B, D, and G fall within the ruling in the Keystone Metals case.

Appendix A

ORDER OF COURT

And now, to-wit Sep. 3, 1954 exceptions filed by defendants are overruled, and exceptions filed by the plaintiff are affirmed.

By the Court
T M M

Eo die, exception noted and bill sealed.

THOS. M. MARSHALL [SEAL]
Judge.

Opinion of the Supreme Court of Pennsylvania.

Filed: May 4, 1955

HORACE STERN, C. J.

The question is whether certain sales made by The Wieman and Ward Company, a Pennsylvania corporation engaged in Pittsburgh in the business of wholesale dealer in coal, coke and pig iron, are transactions the gross receipts from which are properly includable in computing the mercantile license taxes of the City of Pittsburgh and the School District of Pittsburgh, or whether they are exempt therefrom because they involve interstate commerce.

The mercantile license tax of the City of Pittsburgh is imposed under an Ordinance which is authorized by the Act of June 25, 1947, P. L. 1145, as amended, and which provides, in the case of a wholesale dealer, for a tax at the rate of 1 mill on each dollar of the volume of his annual gross business. The mercantile license

tax of the School District is imposed by the Act of June 20, 1947, P. L. 745, as amended, which provides, in the case of a wholesale dealer, for a tax at the rate of ½ mill on each dollar of the volume of his annual gross business.

The Wieman and Ward Company filed with the City and the School District combination mercantile tax returns for the years 1948, 1949, 1950, and 1951, based on its annual gross intrastate business, and it duly paid the taxes thereon. The City and the School District, however, assessed the Company additional taxes based upon sales in which certain interstate features were involved. The Company filed bills of complaint that the additional assessments be declared null and void. The court below sustained its contentions, whereupon the City and the School District took the present appeals.

The transaction on which the controversy is based are classified by the parties in six categories for convenience of treatment:[1]

Class A transactions consist of sales of coal to Pennsylvania buyers. The coal is purchased by The Wieman and Ward Company from out-of-State mines specified by the buyer and delivered directly, at the buyer's direction, to the buyer's customers out of the State. A typical example is a sale of certain specified coal to the H. C. Frick Coke Company of Pittsburgh, the

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1. There is a seventh category representing sales of Pennsylvania mined coal, mostly to the Pennsylvania Railroad at their scales in Pennsylvania, for shipment over their system to points when and where needed. Appellee admits that these transactions are taxable and therefore they are not in dispute.

coal being procured from a mine in Kentucky and shipped directly to an Ohio customer of the Frick Company.

Class B transactions consist of sales of coal to Pennsylvania buyers. The coal is purchased by The Wieman and Ward Company from mines in Pennsylvania specified by the buyer and delivered directly, at the buyer's direction, to the buyer's customers out of the State. A typical example is a sale of certain specified coal to the Cortright Coal Company in Pittsburgh, the coal being procured from a mine in Pennsylvania and shipped to a New Jersey customer of the Cortright Company. A similar transaction was described as a sale to the Pennsylvania Coal & Coke Corporation in Philadelphia of a specified coal mined in Pennsylvania and shipped to the latter's customer in Maryland.

Class C transactions consist of sales to the Baltimore and Ohio Railroad Company, the principal office of which is located in Baltimore, of a specified coal procured from out-of-State mines and delivered to the Railroad Company at their scales in Pennsylvania.

Class D transactions consist of sales to Pennsylvania buyers of coal specified by the buyer, procured from out-of State mines, and delivered to the buyer or the buyer's customers in Pennsylvania. A typical example is a sale to Jones and Laughlin Steel Corporation of Pittsburgh of certain specified coal procured from a mine in West Virginia, and shipped to the purchaser's blast furnace at Aliquippa, Pennsylvania.

Class E transactions consist of sales to the Weirton Steel Company of Weirton, West Virginia, of certain

specified coal mined in West Virginia and delivered by barges to a point on the Monongahela River within Pennsylvania designated by the buyer; at that point the buyer loads additional coal from its own mine on the barges which then continue on to Weirton.

Class F transactions consist of sales, also to the Weirton Steel Company, of coal mined in Pennsylvania and delivered by truck to a point on the Monongahela River within Pennsylvania designated by the buyer; there it is loaded by the buyer, together with its own coal, on barges which take it to Weirton.

The mercantile license taxes here involved are taxes on the privilege or business of selling merchandise, in the one case in the City of Pittsburgh and in the other in the School District of Pittsburgh. The mere fact that transactions may to some extent involve interstate commerce does not necessarily exempt them from local taxation. It was said in *McGoldrick, Comptroller of the City of New York, v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 46, 47: "Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms a tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress." And in *International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 344, it was said: "* * * * neither the Commerce Clause nor the Fourteenth Amendment prevents the imposition of the [State] tax on receipts from an intrastate transaction even though

the total activities from which the local transaction derives may have incidental interstate attributes."

Some of the circumstances under which local taxation is not unconstitutional even where there is a transportation of goods across state lines are discussed at length in *Keystone Metal Co. v. Pittsburgh*, 374 Pa. 323, 97 A.2d 797 (cert. den. 346 U.S. 887, rehearing den. 917). It was there pointed out (p. 327, A.p. 799) that the Supreme Court of the United States has held in many cases there cited,[2] that, although a transaction viewed as a whole may be one in interstate commerce, there may be certain "intrastate events" or "local activities" in connection therewith that permit the imposition of a State tax. We stated that "The solution of the question whether a State tax falls within this latter category depends entirely on the particular facts in each instance," and (p. 328, A. p. 799) it "is not determined by the broad concept of what constitutes interstate commerce when problems of State *regulation* are concerned; it depends rather on whether there are sufficient local incidents to validate the tax, even though the total activities from which the transaction arises may have incidental interstate attributes." And we held in that case that sales of copper scrap made by a Pittsburgh seller to Pittsburgh buyers were properly included as gross receipts under the same mercantile license taxes

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2. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250; *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 176; *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 58; *International Harvester Co. v. Department of Treasury*, 322 U.S. 340; *Norton Co. v. Department of Revenue of Illinois*, 340 U.S. 534.

as those here involved, even though the material itself never came into Pennsylvania but was delivered directly from out-of-State suppliers to parties outside the State not affiliated with either the seller or the buyers.

We turn, then, to the Class A transactions. In these the coal is sold by the appellee company, a Pittsburgh dealer, to Pittsburgh buyers; the transaction of sale is consummated in Pennsylvania and clearly forms part of the total business activities of the company on which the mercantile license tax is imposed. It is true that the buyer in such transaction specifies a kind of coal which is obtainable only from an out-of-State mine and gives shipping instructions for delivery to the buyer's out-of-State customer, but in the *Keystone Metal Company* case it was held that the fact that the sale was made in Pennsylvania by a Pennsylvania dealer to a Pennsylvania buyer was an "intrastate event" or "local activity" sufficient to justify the right of the City and the School District of Pittsburgh to include such a transaction within the measure of the mercantile license taxes. It is true also, of course, that there is necessarily involved a physical transportation of goods from one State to another, thereby constituting interstate commerce, but the mere fact that such transportation is induced or occasioned by a local business transaction does not render the transaction exempt from local taxation: *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 253.

Appellee seeks to distinguish these Class A transactions from the ruling in the *Keystone Metal Company* case by pointing out that here the buyer's specification was for coal to be obtained from an out-of-State mine, whereas in the *Keystone Metal Company* case the scrap

copper might possibly have been obtained in Pennsylvania although in the particular instance it had to be procured elsewhere. But this difference would scarcely seem to be of significance from a legal standpoint because in both cases a physical transportation of the coal or the copper takes place across State lines and therefore interstate commerce is as much involved in the one instance as in the other. Another attempted distinction is that in the *Keystone Metal Company* case the copper was sent to a consignee in New Jersey for processing whereas in the present case the coal is delivered to an out-of-State buyer for consumption, but this fact likewise furnishes no basis for a legal differentiation because it is obvious that the mere purpose or object of the consignee in receiving the shipment has no bearing whatever on the interstate nature of the transaction. We conclude, therefore, that the transactions in Class A are includable in the volume of appellee's gross receipts in computing these mercantile license taxes.

The same result necessarily follows in regard to the *transactions* in Classes B and D. In Class B as in Class A the sales of coal are made by a Pennsylvania dealer to Pennsylvania buyers, the only difference being that the buyer in this instance specifies a Pennsylvania instead of an out-of-State mine, a fact which, if anything, makes the transaction even more of a "local event." In Class D the sales likewise are made by a Pennsylvania dealer to Pennsylvania buyers although the coal is procured from out-of-State mines specified by the buyer it is delivered to the buyer or his customers in Pennsylvania. There is here, therefore, a sale in Pennsylvania and a delivery in Pennsylvania, and consequently an obviously taxable transaction.

As to Class C transactions, there is some apparent controversy in regard to the State in which the sale of the coal is effected. All appellee's salesmen, with the exception of three not here involved, are located in the company's Pittsburgh office, and, while they doubtless contact buyers outside the State in order to negotiate sales, there is nothing in the record to indicate but that all orders thus obtained were subject to acceptance, and were accepted, and the sales thereby consummated, at appellee's home office. The coal in these transactions is delivered to the buyer in Pennsylvania, and such a delivery has even been held in certain cases to constitute in itself an adequate taxable event: *Department of Treasury of Indiana v. Wood Preserving Corporation,* 313 U.S. 62, 67, 68; *International Harvester Co. v. Department of Treasury,* 322 U.S. 340, 345. Even if the orders for the sales were obtained and the contracts executed outside Pennsylvania, this is not controlling in regard to the question of the taxability of the transaction where there is such intrastate delivery: *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 253; *Department of Treasury of Indiana v. Wood Preserving Corporation,* 313 U.S. 62; *Department of Treasury of Indiana v. Ingram-Richardson Manufacturing Co. of Indiana,* 313 U.S. 252, 254; *International Harvester Co. v. Department of Treasury,* 322 U.S. 340, 345. We conclude, therefore, that the Class C. sales have sufficiently the nature of local transactions to justify the inclusion of the receipts therefrom in the volume of appellee's business activities on the basis of which the City's and School District's mercantile license taxes are computed.

Class E transactions consist of sales to a West Virginia company of coal mined in that same State and

shipped on barges on the Monongahela River. The sales are negotiated in West Virginia but the orders are accepted, and therefore the sales contracts made, in Pennsylvania. There is a question concerning these transactions as to the place during the course of the interstate transportation where delivery is made by the appellee to the buyer. It appears that the coal is loaded on the barges in West Virginia which are towed by a boat controlled by appellee to a place on the river called Isabella which is in Pennsylvania and which is designated by the buyer as the point of destination. There the buyer takes over, loads other coal of its own on the barges, and tows them by its own boat to its plant in West Virginia. It would seem, therefore, that dominion over the shipment is transferred from the appellee to the buyer at Isabella and, that being so, the transaction is one where, in addition to the fact that the final contracts of sale are made in Pennsylvania, delivery is also made within that State. Under such circumstances it is clear that these transactions also are subject to the mercantile license taxes. It is argued by appellee that the only reason for the buyer's accepting delivery at Isabella is that, before that point is reached, the barges cannot be completely loaded because of the shallower draft of the river. But the reason for making the delivery at that point is immaterial; it is the fact of the delivery there that is controlling. Nor does it matter in this connection that appellee knows that interstate transportation of the coal be contemplated and will occur after the barges leave Isabella; *Chassaniol v. City of Greenwood,* 291 U.S. 584; *Department of Treasury of Indiana v. Wood Preserving Corporation,* 313 U.S. 62; *International Harvester Company v. Department of Treasury,*

322 U.S. 340, 345; *Interstate Oil Pipe Line Co. v. Stone,* 337 U.S. 662.

Class F transactions are similar in all respects to those in Class E except that the coal is mined in Pennsylvania and delivered by truck to a point on the Monongahela River within Pennsylvania where it is loaded by the buyer, together with its own coal, on barges which take it to its ultimate destination. Here the fact of intrastate delivery is even more clear than in the preceding class, and accordingly the transactions are similarly taxable.

The question has been raised whether the so-called multiple burden test discussed in *Western Live Stock v. Bureau of Revenue,* 303 U. S. 250, has been discarded or modified by decisions of the United States Supreme Court since the original enunciation of that principle. That subject was discussed at some length in the *Keystone Metal Company* case and requires no repetition here. It is clear that even if a tax of some kind could be imposed by the State of the supplier,—the State where the coal is mined and is purchased by the appellee,—no State other than Pennsylvania could impose a tax on appellee's sale of the coal, and it is *that* transaction, not the previous *purchase* transaction, which enters into the volume of its business for the privilege of conducting which these mercantile license taxes are imposed. Nor would any property or use tax after the coal has entered the State of delivery constitute a "multiple burden" tax on appellee's sale of the coal: *Wiloil Corporation v. Pennsylvania,* 294 U. S. 169; *McGoldrick, Comptroller of the City of New York v. Berwind-White Coal Mining Co.,* 309 U. S. 33. Therefore,

even if the multiple burden test were to be applied, it would support the validity of these taxes: *Keystone Metal Company v. Pittsburgh,* 374 Pa. 323, 331, 332, 97 A.2d 797, 801.

To summarize, therefore, we are of opinion that even though physical transportation of the coal is made in each of the classes in question across State lines and therefore involves the element of interstate commerce, there are, in each of the classes, sufficient local features or events to justify the inclusion by the City and the School District of Pittsburgh of the gross receipts from such transactions in the measure of appellee's business activities for the privilege of conducting which the mercantile license taxes are imposed.

The orders of the court below are reversed at appellee's cost.

Mercantile License Tax of School District of Pittsburgh.

Act of June 20, 1947, P. L. 745, Pa. Stat. Ann. tit. 24 §582.1

"§582.1 Definitions

"The following words and phrases when used in this act shall have the meanings ascribed to them in this section unless the context clearly indicates a different meaning.

* * * * * * * *

"(2) 'Wholesale dealer' or 'Wholesale vendor' shall mean any person who sells to dealers in, or vendors of, goods, wares and merchandise and to no other persons.

* * * * * * * *

"§582.4 Imposition and rate of tax

"Every person engaging in any of the following occupations or businesses in any school district of the first class shall pay an annual mercantile license tax at the rate set forth:

"(1) Wholesale vendors or dealers in goods, wares and merchandise and brokers, at the rate of one-half (½) mill on each dollar of the volume of the annual gross business transacted by him;

* * * * * * * *

"§582.12 Saving clauses

* * * * * * * *

"(b) Nothing contained in this act shall be construed to empower any school district of the first class to levy and collect the taxes hereby imposed on any person or on any business or any portion of any business not within the taxing power of this Commonwealth under the Constitution of the United States."

Mercantile License Tax of City of Pittsburgh Ordinance No. 488 of 1947.

AN ORDINANCE—To provide revenue for the City of Pittsburgh by imposing a mercantile license tax on persons engaged in certain occupations and businesses therein; providing for its levy and collection and for the issuance of mercantile licenses; and conferring and imposing powers and duties on the Treasurer of the City of Pittsburgh, and imposing penalties. THE COUNCIL OF THE CITY OF PITTSBURGH HEREBY ENACTS AS FOLLOWS:

SECTION 1. Definitions:—The following words and phrases when used in this ordinance shall have the meanings ascribed to them in this section unless the context clearly indicates a different meaning:

* * * * * * *

(b) "Wholesale dealer" or "Wholesale vendor" shall mean any person who sells to dealers in, or vendors of, goods, wares and merchandise and to no other persons.

* * * * * * *

SECTION 2. Levy and Collection of Tax.—For the year 1948 and annually thereafter the City hereby imposes an annual mercantile license tax in the manner and at the rates hereinafter set forth.

* * * * * * *

SECTION 4. Imposition and Rate of Tax.—Every person engaging in any of the following occupations or businesses in the City shall pay an annual mercantile license tax for the year 1948 and annually thereafter at the rate set forth:

(a) Wholesale vendors or dealers in goods, wares and merchandise, at the rate of one (1) mill on each dollar of the volume of the annual gross business transacted by him:

* * * * * * *

SECTION 11. Saving Clause.—(a) Nothing contained in this ordinance shall be construed to empower the City to levy and collect the taxes hereby imposed on any person, or any business, or any portion of any business not within the taxing power of the City under the Constitution of the United States and the laws and Constitution of the Commonwealth of Pennsylvania.

* * * * * * *

APPENDIX B

Summary of Transactions.

CLASS A

Class A transactions consist of sales from out of state mines and ovens to Pennsylvania Companies for delivery directly to third parties out of state. The coal or coke never enters the state of Pennsylvania. The purchaser specifies the source of the coal or coke which he wishes to purchase.

CLASS B

Class B transactions consist of sales from Pennsylvania mines and ovens to dealers in Pennsylvania but delivered directly to third parties out of state. There is no delivery in Pennsylvania.

CLASS C

Class C transactions consist of sales from out of state mines to out of state purchasers (the Baltimore & Ohio Railroad in all instances) for delivery to scales in Pennsylvania. The purchaser specifies the source of the coal which he wishes to purchase, the negotiations for these sales were carried on out of state and the orders were placed from out of state.

CLASS D

Class D transactions consist of sales from out of state mines and ovens to Pennsylvania companies for delivery to them or their customers in Pennsylvania. The purchaser specifies the source of the coal or coke which he wishes to purchase.

CLASS E

Class E transactions consist of sales from out of state mines to Weirton Steel Company, Weirton, West Virginia. The contract which was negotiated in Weirton, West Virginia, required Petitioner to load West Virginia Coal into Weirton barges at loading points along the Monongahela River in West Virginia. The barges would be loaded as fully as water conditions on the river would permit and then delivered to Weirton's loading station at Isabella where, because of greater river depth, the barges would be completely loaded with Weirton coal by Weirton and then towed direct to the Weirton Steel Company at Weirton, West Virginia. The layover at Isabella, Pennsylvania, was no longer than necessary to complete the loading of the barges.

CLASS F

Class F transactions consist of sales from Pennsylvania mines to Weirton Steel Company, Weirton, West Virginia. The contracts, which were negotiated in Weirton, West Virginia, required Petitioner to ship the coal from the mines by truck for loading into Weirton Barges for immediate shipment to Weirton, West Virginia, for use there.

4/22

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 259

THE WIEMAN AND WARD COMPANY, Petitioner

v.

CITY OF PITTSBURGH and JAMES P. KIRK, Treasurer

and

THE WIEMAN AND WARD COMPANY, Petitioner

v.

THE SCHOOL DISTRICT OF PITTSBURGH and JAMES P. KIRK, Treasurer

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

In this case the Wieman and Ward Company, petitioner, has asked your Honorable Court to allow certiorari with respect to a decision of the Supreme Court of Pennsylvania holding that respondents' mercantile taxes as applied to petitioner do not constitute an undue burden on interstate commerce. Respondents, the City of Pittsburgh and the School District of Pittsburgh, respectfully submit that the prayer of the Petition for Writ of Certiorari should not be granted for the following reasons:

I. Petitioner Has Failed to Show Sufficient Reasons For Allowance of Writ of Certiorari.

Rule 19 of the Revised Rules of the United States Supreme Court sets forth the character of reasons for the granting of certiorari by this Court. In order to

invoke the discretionary exercise of the power to grant certiorari with respect to a final judgment of the highest appellate court of a State, it should be shown that:

(a) The State Court has decided a Federal question of substance not theretofore determined by this Court; or that

(b) The State Court has decided a Federal question of substance in a way which is probably not in accord with the applicable decisions of this Court.

Respondents propose to demonstrate in this Brief that the questions in issue in this Petition have been heretofore ruled upon by this Court, and that the decision of the Supreme Court of Pennsylvania in *Wieman and Ward Company v. City of Pittsburgh et al.*, 381 Pa. 535, 113 A. 2d 719 (1955), with respect to the applicability of the commerce clause of the Federal Constitution to the taxes imposed by respondents is in accord with the prior decisions of this Court.

II. Nature of Taxes Imposed By Respondents.

It is important preliminarily to describe the nature of the taxes in issue in this case. The taxes are mercantile taxes imposed by the City of Pittsburgh and by the School District of Pittsburgh upon the privilege of doing business in that city. The taxes imposed by the two political subdivisions are identical for the purposes of this case. The taxes are measured by the gross receipts attributable to the taxpayer's business activities within the city. Petitioner, a Pennsylvania corporation with its principal place of business in the City of Pittsburgh, is engaged in the business of wholesale vendor or dealer in coal, coke and pig iron.

The Supreme Court of Pennsylvania has ruled that the mercantile tax is a tax on the privilege of selling goods and merchandise in Pittsburgh: *Puntureri v. Pittsburgh School District,* 359 Pa. 596, 599, 60 A. 2d 42, 43 (1948). Respondents' mercantile taxes are the same as the former Pennsylvania State mercantile tax which the Pennsylvania courts held to be an excise tax upon the privilege of doing business or upon the business of selling or of vending merchandise: *Knisely v. Cotterel,* 196 Pa. 614, 628, 630, 46 Atl. 861, 862, 863 (1900); *Blauner's, Inc. v. Philadelphia,* 330 Pa. 342, 346, 198 Atl. 889, 891, 892 (1938). The courts have emphasized that mercantile taxes are not taxes on sales nor taxes upon property or income.

Respondents' taxes do not fall either on intrastate or interstate business; they are imposed on the privilege of doing business in Pittsburgh and are measured by gross receipts from sales. There is no discrimination between interstate and intrastate selling. If respondents' taxes discriminate against interstate commerce or are an undue burden on interstate commerce, petitioner has failed to prove it in the State courts or allege it in this Petition although the burden of proof rests upon petitioner. A taxpayer claiming immunity from a tax on the basis of the commerce clause has the burden of establishing the exemption: *Norton Co. v. Department of Revenue of Illinois,* 340 U. S. 534, 537 (1951). In *Chicago v. Willett,* 344 U. S. 574, 578 (1953), this Court said:

> "* * * the taxpayer here makes no showing that the tax, though directed at interstate business only, in fact burdens interstate commerce. This is for the taxpayer to show affirmatively and respondent has made no attempt to do so."

The key to determining the constitutionality of respondents' taxes as applied in this case is whether the taxable event, the petitioner's business and selling activities in the City of Pittsburgh, contains sufficient local incidents to support the local taxes. We respectfully submit that in each of the six classes of transactions in issue in this case sufficient local incidents are present to uphold the validity of respondents' taxes, as hereinafter demonstrated.

III. The Decision of the Supreme Court of Pennsylvania Is in Accord With the Decisions of This Court Upholding the Validity of Local Privilege Taxes Measured By Gross Receipts Where Sufficient Local Incidents Are Present, Even Though Transportation Across State Lines Is Involved.

The Supreme Court of Pennsylvania stated in its opinion in this case:

> "* * * although a transaction viewed as a whole may be one in interstate commerce, there may be certain 'intrastate events' or 'local activities' in connection therewith that permit the imposition of a State tax. * * *" 381 Pa. at 541, 113 A.2d at 721.

The Pennsylvania Court cited a number of leading cases decided by this Court in support of this principle: *Western Live Stock v. Bureau of Revenue,* 303 U. S. 250 (1938); *Southern Pacific Co. v. Gallagher,* 306 U. S. 167, 176 (1938); *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U. S. 33, 58 (1940); *International Harvester Co. v. Department of Treasury,* 322 U. S. 340 (1944); *Norton Co. v. Department of Revenue of Illinois,* 340 U. S. 534 (1951).

Complementing the principle that local incidents or activities support local taxes is the repeated assertion of this Court that interstate commerce may be made to pay its own way: *Western Live Stock v. Bureau of Revenue, supra,* at page 254; *Braniff Airways v. Nebraska State Board,* 347 U. S. 590, 598 (1954).

If these principles are applied in the case at bar, it is readily apparent that the challenged taxes are valid.

A. *Transactions between a Pittsburgh seller and Pennsylvania buyers are subject to respondents' mercantile taxes regardless of the source of supply of the products of the sale or their place of delivery (Classes A, B and D).*

The first class of transactions discussed by petitioner in the Argument section of its Petition is the Class A transaction. Class A transactions consist of sales of coal by petitioner to Pittsburgh buyers. The coal is purchased by petitioner from out-of-State mines specified by the buyer and is delivered directly to the buyer's customers out of the State at the request of the buyer. A typical transaction is a sale of coal to the H. C. Frick Coal Company of Pittsburgh for delivery to the latter's customers in Ohio and Indiana.

Class B and Class D transactions are variations of the sales described in Class A. Class B transactions consist of sales of coal by petitioner to Pennsylvania buyers. The coal purchased by petitioner is mined in Pennsylvania and is delivered directly to the buyer's customers outside the State at the request of the buyer. An example of this transaction is a sale of coal to the Cortright Coal Company of Philadelphia for delivery to its customer in New Jersey.

Class D transactions consist of sales of coal by petitioner to Pittsburgh buyers. The coal is purchased by petitioner from out-of-State mines specified by the buyer and is delivered to the buyer or his customers in Pennsylvania. A typical transaction is a sale of coal to the Jones and Laughlin Steel Corporation of Pittsburgh for delivery to its plant in Aliquippa, Pennsylvania.

The validity of mercantile taxes on the privilege of doing business in Pittsburgh, measured by receipts from sales transactions virtually identical with the Class A, B and D transactions in this case, was in issue in a case decided by the Supreme Court of Pennsylvania in 1953: *Keystone Metal Co. v. Pittsburgh,* 374 Pa. 323, 97A. 2d 797, certiorari denied, 346 U. S. 887, petition for rehearing of denial of certiorari denied, 346 U. S. 917 (1953).

The Keystone Metal Company was a Pennsylvania corporation having its place of business in the City of Pittsburgh. The Company was engaged in the business of buying and selling nonferrous metals. In the disputed transactions in the *Keystone* case the Company sold quantities of copper scrap to the Westinghouse Electric Corporation and the National Electric Products Corporation, both Pennsylvania corporations with offices in Pittsburgh. The purchase orders placed with Keystone by Westinghouse and National specified the quantity of scrap described, with a provision that the scrap was to be shipped directly to a smelting and refining company in New Jersey, the latter company not being an affiliate of the buyers. Since Keystone did not itself keep any copper scrap on hand it purchased the scrap from suppliers within and outside Pennsylvania. Keystone's suppliers during the tax period in issue were

located in Ohio, West Virginia, Florida, North Carolina, South Carolina and Missouri, as well as in Pennsylvania. At the request of the buyers the seller had the suppliers ship the scrap directly to the refinery in New Jersey. Most of the scrap was obtained by Keystone from out-of-State suppliers.

The copper scrap shipped in the *Keystone* case obviously moved across state lines. Most of the scrap was never physically present in Pennsylvania. The Pennsylvania Supreme Court held that respondents may measure their mercantile taxes by receipts from these sales made by the Keystone Metal Company. These were sales by a company doing business in Pittsburgh, and the Court held that the mercantile taxes "should be sustained as falling upon local transactions which, even though giving rise to interstate transportation, are sufficiently separate and distinct to admit of State taxation." 374 Pa. at 329, 97 A. 2d at 800.

The Keystone Metal Company petitioned this Court for a writ of certiorari, which was denied: 346 U. S. 887 (1953). Subsequently, the Company petitioned for a rehearing of the order denying the writ of certiorari and this Petition was also denied: 346 U. S. 917 (1953).

We respectfully submit that the petitioner in this case has shown no additional or different grounds for allowance of certiorari than were presented in the *Keystone Metal Company* case, and that, therefore, the Petition in the case at bar should be denied.

In the Petition, as in its argument to the Pennsylvania Supreme Court, petitioner has attempted to distinguish the *Keystone Metal Company* case on the ground that in the Class A transactions in the case at bar the

coal is obtained from out-of-State mines specified by the buyer, whereas in the *Keystone Metal Company* case the copper scrap was obtained outside of Pennsylvania at the discretion or convenience of the seller rather than at the specification of the buyer. The Pennsylvania Supreme Court rejected this purported distinction as of no legal significance. The Court said:

> "Appellee seeks to distinguish these Class A transactions from the ruling in the *Keystone Metal Company* case by pointing out that here the buyer's specification was for coal to be obtained from an out-of-State mine, whereas in the *Keystone Metal Company* case the scrap copper might possibly have been obtained in Pennsylvania although in the particular instance it had to be procured elsewhere. But this difference would scarcely seem to be of significance from a legal standpoint because in both cases a physical transportation of the coal or the copper takes place across State lines and therefore interstate commerce is as much involved in the one instance as in the other. * * *" 381 Pa. at 542, 113 A. 2d at 722.

The refusal of the Pennsylvania Supreme Court to give any weight to this alleged distinction is supported by decisions of this Court: *Banker Bros. Co. v. Pennsylvania,* 222 U. S. 210 (1911); *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U. S. 33 (1940). In both of these cases it was an essential part of the sales transaction which was taxed that the goods sold would be supplied from an out-of-State source.

It is interesting to note that in the *Berwind-White* case the tax was challenged on the basis of the same

"unique coal" doctrine asserted by petitioner. The taxable transaction in that case related to a sale of coal in New York City, and it was an essential part of the transaction that the coal sold must be coal produced in Pennsylvania. In discussing the purported distinction between contracts which contemplate or require interstate shipment and those which do not, Chief Justice Stone said:

> "But we think this distinction is without the support of reason or authority." 309 U. S. at 54.

Stripped of any distinguishing features, the Class A, B and D transactions clearly come within the decision of the Pennsylvania Supreme Court in the *Keystone Metal Company* case, and we submit that this Court should deny certiorari to the present petitioner as was done in the *Keystone* case.

B. *Sales transactions involving non-Pennsylvania buyers are taxable where delivery is made in Pennsylvania.*

The other three classes of transactions in issue in this Petition relate to sales made by petitioner, a Pittsburgh seller, to out-of-State buyers where delivery is made in Pennsylvania at the request of the buyer.

Class C transactions consists of sales of coal by petitioner to the Baltimore and Ohio Railroad Company, which has its main office in Maryland. The coal is purchased by petitioner from out-of-State mines specified by the buyer and is delivered to the buyer in Pennsylvania.

Class E transactions consist of sales of coal by petitioner to the Weirton Steel Company, a West Vir-

ginia corporation. The coal is purchased by petitioner from out-of-State mines specified by the buyer and delivered by barges to a point within Pennsylvania designated by the buyer. The buyer subsequently ships the coal to West Virginia.

Class F transactions also consist of sales of coal to the Weirton Steel Company. The coal purchased by petitioner is mined in Pennsylvania and is delivered by truck to a point within Pennsylvania designated by the buyer. The coal is loaded on barges and subsequently shipped by the buyer to West Virginia.

Petitioner has laid great stress upon the fact that the negotiations for these three classes of sales are carried on outside of the State. It should be pointed out, however, that the orders are accepted at the petitioner's office in Pittsburgh so that the sales are consummated and the contracts executed in Pennsylvania, and petitioner has not contended or shown otherwise. This Court has held in a number of cases that out-of-state solicitation and interstate negotiations do not in themselves control the validity of taxes of this nature: *Department of Treasury v. Ingram-Richardson Manufacturing Co.,* 313 U. S. 252, 254 (1941); *Western Live Stock v. Bureau of Revenue,* 303 U. S. 250, 253 (1938); *Compania General v. Collector of Internal Revenue,* 279 U. S. 306 (1929).

The Supreme Court of Pennsylvania upheld the validity of respondents' taxes with respect to Class C transactions, stating:

> "* * * The coal in these transactions is delivered to the buyer in Pennsylvania, and such a

delivery has been held in certain cases to constitute in itself an adequate taxable event: *Department of Treasury of Indiana v. Wood Preserving Corporation,* 313 U. S. 62, 67, 68; *International Harvester Co. v. Department of Treasury,* 322 U. S. 340, 345. * * *" 381 Pa. at 543-544, 113 A. 2d at 723.

Petitioner contends that Class E and F transactions should not be taxable because the coal delivered in Pennsylvania to the out-of-State buyer is subsequently transported by the buyer to West Virginia and the ultimate out-of-State destination is known at the time of the delivery in Pennsylvania. In answer to this argument the Pennsylvania Supreme Court said:

"* * * It would seem, therefore, that dominion over the shipment is transferred from the appellee to the buyer at Isabella [Pennsylvania] and, that being so, the transaction is one where, in addition to the fact that the final contracts of sale are made in Pennsylvania, delivery is also made within that State. Under such circumstances it is clear that these transactions also are subject to the mercantile license taxes. It is argued by appellee that the only reason for the buyer's accepting delivery at Isabella is that, before that point is reached, the barges cannot be completely loaded because of the shallower draft of the river. But the reason for making the delivery at that point is immaterial; it is the fact of the delivery there that is controlling. Nor does it matter in this connection that appellee knows that interstate transportation of the coal is contemplated and will occur after the barges leave Isabella: *Chassaniol v. City*

of Greenwood, 291 U. S. 584; *Department of Treasury of Indiana v. Wood Preserving Corporation,* 313 U. S. 62; *International Harvester Company v. Department of Treasury,* 322 U. S. 340, 345; *Interstate Oil Pipe Line Co. v. Stone,* 337 U. S. 662." 381 Pa. at 545, 113 A. 2d at 723.

It can be readily seen that the taxability of Class C, E and F transactions are supported by a long line of decisions of this Court. We respectfully submit, therefore, that there is no new or exceptional constitutional question involved in these transactions, and that, therefore, the Petition should be denied.

IV. Respondents' Taxes Are Supportable on the Basis of the Multiple-Burden Theory Which, Contrary to the Assertion of Petitioner, Has Not Been Abandoned By This Court.

Petitioner devotes part of its Argument to the assertion that respondents' taxes are constitutionally vulnerable because interstate shipment is involved. This position is predicated upon petitioner's contention that *Freeman v. Hewit,* 329 U. S. 249 (1946), abolished the so-called multiple-burden theory enunciated by Chief Justice Stone in *Western Live Stock v. Bureau of Revenue,* supra. The Pennsylvania Supreme Court grounded its decision in this case and in the prior *Keystone Metal Company* case in part upon the fact that even though interstate shipment was involved, no other state had the power to impose a tax on the transactions taxed by respondents. Neither the state of the supplier where the goods are obtained from out-of-State sources, nor the state of delivery where the goods are delivered out-

side of Pennsylvania at the request of the buyer, has the power to impose a tax upon petitioner for the privilege of carrying on its business in the City of Pittsburgh. Respondents cannot believe that this Court abandoned the multiple-burden theory in *Freeman v. Hewit,* when the rationale of that doctrine has been applied in a number of later cases, including *Central Greyhound Lines v. Mealey,* 334 U. S. 653, 662 (1948), *Interstate Oil Pipe Line Co. v. Stone,* 337 U. S. 662 (1949), and *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U. S. 157, 170 (1954).

Even before the multiple-burden theory was fully developed in 1938, this Court had upheld state taxes on separable local incidents or activities which at some stage of the entire transaction involved interstate shipment of goods: *Chassaniol v. City of Greenwood,* 291 U. S. 584 (1934); *Wiloil Corporation v. Pennsylvania,* 294 U. S. 169 (1935).

Respondents believe that the reasoning behind the so-called multiple-burden test is still effective to support local taxation against the challenge of the Federal commerce clause. We respectfully submit that *Freeman v. Hewit* has not caused any startling shift in the law in this field to support the allowance of a Petition for Certiorari in this case.

V. Conclusion.

The two major classifications of transactions involved in this case are:

1. Sales transactions between a Pittsburgh seller and Pennsylvania buyers, where the goods sold are acquired from out-of-State sources and/or delivered to the buyers' customers outside of the State (Classes A, B and D).

2. Sales transactions between a Pittsburgh seller and out-of-State buyers, where the goods sold are delivered to the buyers in Pennsylvania (Classes C, E and F).

The legal issues inherent in these transactions have been before this Court in a number of cases. The decision of the Supreme Court of Pennsylvania in this case is in accord with the prior applicable decisions of this Court.

With respect to the first major classification described above, this Court has upheld local taxes measured by gross receipts where there are adequate local incidents or events to support local taxation: *Western Live Stock v. Bureau of Revenue,* supra; *Wisconsin v. J. C. Penney,* 311 U. S. 435 (1940). The fact that the goods sold are supplied from sources outside the taxing jurisdiction has never been held to be a bar to local taxation: *Wiloil Corporation v. Pennsylvania,* 294 U. S. 169 (1935); *McGoldrick v. Berwind-White Coal Mining Co.,* supra. The fact that delivery is in some cases made outside the State at the request of the Pennsylvania buyers does not preclude taxation since all of the other incidents of the transactions occur in Pennsylvania. In

holding that out-of-State delivery does not free a sales transaction of this nature from local taxation, the Pennsylvania Supreme Court said in the *Keystone Metal Company* case:

> "* * * Had the delivery been made to the buyers in Pennsylvania and the goods then transhipped to the smelting plant, there would be no question but that the transactions were subject to the tax, and the mere fact that a short-cut was adopted by which shipment was made direct to the New Jersey refinery cannot relieve Keystone of its duty to 'pay its way' for the privilege of doing business in Pittsburgh. * * *" 374 Pa. at 330, 97 A. 2d at 800.

With respect to the second major classification of transactions, the fact that the petitioner, a Pennsylvania corporation having its main office in the City of Pittsburgh, carries on its selling activities within the taxing jurisdiction and the fact that delivery of the goods sold is made to the out-of-State buyers in Pennsylvania, are sufficient to support the local taxes.

Petitioner has neither averred nor shown that the questions involved herein are substantive questions which have not heretofore been decided by this Court. Neither has petitioner indicated any exceptional circumstances held requisite by decisions of this Court for granting writs of certiorari.

The taxes herein involved have been ruled to be valid local taxes which:

1. Do not discriminate against either intrastate or interstate commerce and are, therefore, not direct taxes upon interstate commerce; and,

2. Cannot be duplicated by any other taxing jurisdiction; and,

3. In this case present sufficient local incidents to support the tax levy of which petitioner complains.

Respondents respectfully submit that petitioner has presented no sound or conclusive reason why this Court should grant the writ of certiorari. No special or compelling grounds have been shown for this Court to deviate from its rule of exercising its discretion to grant writs of certiorari sparingly. The questions raised in this Petition have been decided by this Court in numerous instances, so that the law controlling the issues raised in the Petition is well established. Since the law so established is adverse to petitioner, respondents urge that the Petition be denied forthwith.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 259

THE WIEMAN AND WARD COMPANY, Petitioner

v.

CITY OF PITTSBURGH and JAMES P. KIRK, Treasurer

and

THE WIEMAN AND WARD COMPANY, Petitioner

v.

THE SCHOOL DISTRICT OF PITTSBURGH and JAMES P. KIRK, Treasurer

PETITION OF THE WIEMAN AND WARD COMPANY FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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PETITION OF THE WIEMAN AND WARD COMPANY FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, THE WIEMAN AND WARD COMPANY, respectfully prays for a rehearing of the order issued on October 10, 1955, which denied The Wieman and Ward Company's Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

Question Presented

Should the City of Pittsburgh and School District of Pittsburgh be permitted to levy mercantile taxes measured by gross receipts of sales by a Pittsburgh dealer to (1) Pennsylvania companies who specify out of state goods for delivery directly to third parties out of state, the goods never entering Pennsylvania; (2) Pennsylvania companies who specify delivery of Pennsylvania goods to third parties out of state; particularly when other states prohibit similar taxes because the transactions are considered to be in interstate commerce and thereby exempt?

Grounds for Rehearing

I.

The questions raised by this case are of importance to the entire nation and not just to your petitioner. Your petitioner believes that the attention of this Court should be directed to the conflict between the cases and regulations of other states and the decision of the Pennsylvania Supreme Court in the case at bar. These cases and regulations have not previously been brought before this Court by the petitioner.

There are six types of transactions involved in this case; however, only two types—Class A and Class B —will be discussed in this petition. Your petitioner believes that the decision of the Pennsylvania Supreme Court in these two transactions is in conflict with the applicable decisions of this Court and is in direct conflict with the law and regulations of other states, as hereinafter set forth.

Class A transactions consist of sales by petitioner of coal or coke from out of state mines and ovens to Pennsylvania purchasers for delivery directly to third parties out of state. The coal or coke never enters the State of Pennsylvania.

Class B transactions consist of sales by petitioner of coal or coke from Pennsylvania mines and ovens to Pennsylvania purchasers but delivered directly to third parties out of state. There is no delivery in Pennsylvania.

In *Gross Income Tax Division of the State of Indiana v. L. S. Ayres and Company,* 118 NE 2d 480 (1954), the Supreme Court of Indiana held that sales by an Indiana department store to Indiana purchasers, who directed that the goods be delivered to third persons out of state, were not taxable under the Indiana gross receipts tax because they were sales in interstate commerce and thereby protected from taxation by the commerce clause of the United States Constitution: U.S. Const., Art. I., Sec. 8, Cl. 3. That case was never brought before this Court for review.

Petitioner submits that there is no difference between the transactions in the *Ayres* case and the Class B transactions of petitioner. Petitioner believes that this Court should determine the taxability of petitioner's transactions in order to, among other things, resolve the confusion surrounding this constitutional question as illustrated by the conflict between this case, as decided by the Supreme Court of Pennsylvania, and the *Ayres* case, as decided by the Supreme Court of Indiana.

II.

At least nineteen states in connection with sales, use and gross receipts taxes have regulations which exempt the proceeds of sales made in the taxing jurisdiction where, as a part of the contract, the seller is required to deliver the goods out of state. These sales are exempt because the states consider the sales to be in interstate commerce. The following states have regulations of this type which may be found in C.C.H. All-State Sales Tax Reporter:

Alabama, Rule I 14-012-014; CCH Ala. § 20-782-784.
California, Ruling No. 2015(C); CCH Calif. § 24-580.
Colorado, Rule No. 45 (B); CCH Colo. § 26-546.
Dist. of Col., Reg. Sec. 401(1); CCH D.C. § 29-508.
Florida, Rule 64; CCH Fla. § 30-564.
Illinois, Art. 5, II 2; CCH Ill. § 34-507.
Iowa, Rule No. 180, 2; CCH Ia. § 36-779.
Kansas, Reg. 94-6-8-C-1; CCH Kan. § 37-522.
Louisiana, Art. 2-29, 5; CCH La. §39-529.
Maryland, Rule No. 64; CCH Md. § 42-567.
Michigan, Rule No. 41; CCH Mich. § 44-641.
Missouri, Reg. N(e); CCH Mo. § 47-614.
North Dakota, Rule 37; CCH N.D. § 537.
Ohio, Rule 139; CCH Ohio §60-642.
Rhode Island, Reg. 6/30/47; CCH R. I. § 66-537.
South Carolina, Reg. 33; CCH S.C. §67-533.
South Dakota, Reg. IV(1)(A)(b); CCH S.D. 68-504.
Utah, Reg. 44; CCH Utah 71-544.
Washington, Rule 193; CCH Wash. § 74-593.

In these states it is clear that where the seller is obligated by the sales contract to deliver the goods out

of state, the proceeds are exempt from taxation. The law of Pennsylvania, as determined by the Supreme Court of Pennsylvania in the case at bar, is in conflict with all the above states. The Pennsylvania Court relies only on the contract having been executed in Pittsburgh and designates that execution as the taxable incident even though delivery is made out of state. In light of the conflict between Pennsylvania and the other states, petitioner submits that this Court should determine whether Pennsylvania is correct or incorrect in permitting the taxation of sales where goods, by contract, are delivered out of state.

Conclusion

Petitioner respectfully prays that this Court grant this Petition for rehearing and direct a Writ of Certiorari in this case so that it may decide the important questions involved and thereby clarify the law with respect to the imposition of gross receipts taxes on sales made in interstate commerce. This question affects the status of sales in Pennsylvania and elsewhere and therefore merits this Court's consideration.

Respectfully submitted,

THE WIEMAN AND WARD COMPANY,
Petitioner

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CERTIFICATE OF COUNSEL PURSUANT TO RULE 58(2)

Counsel for the petitioner hereby certify that this Petition is presented in good faith and not for delay and that it is restricted to the grounds available to petitioner and not previously presented.

MOORHEAD & KNOX

.....

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